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DEPARTMENT OF COMMERCE

International Trade Administration

[Docket No. 140318257-4257-01]

Differential Pricing Analysis; Request for Comments

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, U.S. Department of Commerce.

ACTION: Request For Comments

SUMMARY: The Department of Commerce (the Department) seeks public comment on its “differential pricing” analysis. This analysis is currently being applied in less-than-fair-value investigations and certain reviews, including administrative reviews to determine when it may be appropriate to use an alternative comparison method based on the average-to-transaction comparison method in making comparisons of export price or constructed export price and normal value. The differential pricing analysis addresses the criteria set forth in section 777A(d)(1)(B) of the Tariff Act of 1930, as amended (the Act), and is applied in accordance with 19 CFR 351.414. Previously, the Department has addressed these criteria using its “targeted dumping” analysis.

DATES: To be assured of consideration, comments must be received no later than [INSERT DATE 45 DAYS AFTER THE PUBLICATION OF THIS NOTICE IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments electronically or in writing. Electronic comments should be submitted to ECWeb@trade.gov. If you submit comments electronically, you do not need to also submit comments in writing. Parties wishing to comment in writing should file, by

the date specified above, a signed original and four copies of each set of comments at the address listed below. The Department will not accept nor consider comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. All comments will be made available to the public in Portable Document Format (PDF) on the Internet at the Enforcement and Compliance Web site at the following address: <http://www.trade.gov/enforcement/>. Accordingly, do not submit any information you do not want to become public; i.e., confidential business information, personally identifiable information, etc. Additionally, all comments will be available for public inspection at Enforcement and Compliance's Central Records Unit, Room 7045, between the hours of 8:30 a.m. and 5 p.m. on business days. To the extent possible, all comments will be posted within 48 hours.

FOR FURTHER INFORMATION CONTACT: Charles Vannatta at (202) 482-4036 or Melissa Brewer at (202) 482-1096.

SUPPLEMENTARY INFORMATION:

Background

By way of background, the sections below describe: (A) The basis for determining whether to apply an alternative comparison methodology under the statute and regulations; (B) the background of the Department's prior targeted dumping regulation and publication of the final rule withdrawing that regulation; and (C) a summary of the Department's targeted dumping analysis as it existed during the time between the *2008 Withdrawal Notice* and the application of the Department's differential pricing analysis

A. Determination to Apply an Alternative Comparison Method

Pursuant to 19 CFR 351.414(c), the Department calculates dumping margins by comparing weighted-average export prices (or constructed export prices) to weighted-average normal values (the average-to-average method) unless the Secretary determines another method is appropriate in a particular case.¹ The Department's regulations also provide that dumping margins may be calculated by comparing the export prices (or constructed export prices) of individual transactions with normal values of individual transactions (the transaction-to-transaction method) or by comparing the export prices (or constructed export prices) of individual transactions with the weighted-average normal value (the average-to-transaction method).² Application of the transaction-to-transaction method is addressed in the Department's regulations at 19 CFR 351.414(c)(2).

Section 777A(d)(1)(B) of the Act mandates that certain criteria be satisfied for the Department to use the average-to-transaction method as an alternative to the standard average-to-average method in a less-than-fair-value investigation. In particular, if the Department finds that there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or time periods,³ and the Department explains why such differences cannot be taken into account using the average-to-average method,⁴ then the average-to-transaction method may be applied as an alternative comparison method in less-than-fair-value investigations. In the past, the Department satisfied these statutory requirements through the use of its targeted dumping analysis.

¹ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Final Modification*, 77 FR 8101 (February 14, 2012) ("Final Modification for Reviews").

² See 19 CFR 351.414(b)(2) and (3).

³ See Section 777A(d)(1)(B)(i) of the Act.

⁴ See Section 777A(d)(1)(B)(ii) of the Act.

B. Withdrawal of Regulatory Provisions Regarding Targeted Dumping for Less-Than-Fair-Value Investigations

On December 10, 2008, the Department promulgated an interim final rule for the purpose of withdrawing 19 CFR 351.414(f) and (g), the regulatory provisions regarding targeted dumping, and the corresponding regulation governing the deadline for the submission of targeted dumping allegations, 19 CFR 351.301(d)(5).⁵ In that rule, the Department explained that it “believes that the withdrawal of the provisions will provide the agency with an opportunity to analyze extensively the concept of targeted dumping” and develop its approach further as it gains experience in evaluating these allegations. The Department invited public comment on the interim final rule, and received comments from a number of parties. These comments have been posted on the Internet for review by the public at <http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html>. These comments have helped to inform the Department as it further develops its approach with respect to the use of the alternative comparison method.

In addition, on April 22, 2014, the Department promulgated a final rule not to apply the previously withdrawn regulatory provisions governing targeted dumping in less-than-fair-value investigations,⁶ after the U.S. Court of International Trade’s decision in *Gold East (Jiangsu) Paper Co. v. United States*.⁷ The Department explained that it continues to defend its position that the withdrawal of the targeted dumping regulations in the *2008 Withdrawal Notice* was proper, and that the withdrawn regulations are not operative. However, the Department also

⁵ See *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008) (*2008 Withdrawal Notice*).

⁶ See *Non-Application of Previously Withdrawn Provisions Governing Targeted Dumping in Antidumping Investigations: Final Rule*, 79 FR 22371 (April 22, 2014).

⁷ *Gold East (Jiangsu) Paper Co. v. United States*, 918 F. Supp. 2d 1317 (Ct. Int’l Trade 2013).

recognized that the U.S. Court of International Trade in *Gold East (Jiangsu) Paper Co. v. United States* agreed with Gold East's argument that the withdrawn regulations should be applied to its dumping margin calculations in that proceeding because there was a procedural defect in the rulemaking process that withdrew the targeted dumping regulations. Therefore, without prejudice to the United States government's right to appeal the decision in *Gold East (Jiangsu) Paper Co. v. United States*, or in other proceedings on that issue, the Department promulgated a rule to clarify the status of the previously withdrawn regulations pursuant to the notice and comment procedures of the Administrative Procedures Act (APA) and to invite comment. The Department received comments from a number of parties concerning whether the previously withdrawn targeted dumping regulations should still be withdrawn, and other comments on the Department's recent approach regarding the alternative comparison method. These comments have also been posted on the internet for review by the public at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=ITA-2013-0002>; and have also helped to inform the Department as it further develops its approach regarding the alternative comparison method.

C. The Targeted Dumping Analysis

1. Examination Based Upon An Allegation: In less-than-fair-value investigations since the 2008 *Withdrawal Notice*,⁸ before considering whether to apply an alternative comparison method, the Department required that an allegation of targeted dumping be filed as stated in the notice of initiation for the investigation.⁹

⁸ Until the implementation of the *Final Modification for Reviews*, the average-to-average comparison methodology was used by the Department only in less-than-fair-value investigations, and, therefore, the use of the targeted dumping provisions was likewise only relevant to these investigations.

⁹ See, e.g., *Polyethylene Retail Carrier Bags From Indonesia, Taiwan, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 74 FR 19049 (April 27, 2009); *Oil Country Tubular Goods From the*

2. The Nails Test: When sufficiently alleged, the Department employed the *Nails* test¹⁰ to determine whether a pattern of prices that differ significantly among purchasers, regions, or periods of time existed within the U.S. market, which was a two-step process.

First, the standard deviation test identified whether the product-specific, weighted-average price to the allegedly targeted group was more than one standard deviation below the product-specific, weighted-average price for all transactions. The alleged targeted group was found to have passed the standard deviation test when more than 33 percent of the sales to the allegedly targeted group passed this test.

Second, those sales passing the standard deviation test were then evaluated to determine whether they passed the “gap” test, which determined whether the weighted-average prices of the identified sales to the allegedly targeted group were not typical. Where the gap (or difference) between the weighted-average prices of the identified sales to the allegedly targeted group and the next highest weighted-average prices to a non-targeted group exceeded the average gap among the weighted-average prices between the non-targeted groups, these identified sales passed the “gap” test. The sales passing the “gap” test were evaluated to determine whether they exceeded five percent of the allegedly targeted group’s total purchases of all products subject to investigation. If the sales passing the gap test were sufficient, then the

People’s Republic of China: Initiation of Antidumping Duty Investigation, 74 FR 20671 (May 5, 2009); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia and the People’s Republic of China: Initiation of Antidumping Duty Investigations*, 74 FR 53710 (October 20, 2009); *Certain Stilbenic Optical Brightening Agents From the People’s Republic of China and Taiwan: Initiation of Antidumping Duty Investigations*, 76 FR 23554 (April 27, 2011).

¹⁰ See *Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008) and *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value*, 73 FR 33985 (June 16, 2008) (collectively, *Nails*), as modified in *Multilayered Wood Flooring from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (October 18, 2011); see also *Mid Continent Nail Corp. v. United States*, Slip. Op. 2010-47 (Ct. Int’l Trade May 4, 2010) and *Mid Continent Nail Corp. v. United States*, Slip. Op. 2010-48 (Ct. Int’l Trade May 4, 2010).

Department considered whether the standard average-to-average method could account for the observed differences.

If the Department's two-step analysis confirmed the allegation of targeted dumping and the sales found to be targeted were of sufficient quantity, then the Department evaluated the difference between the weighted-average dumping margin calculated with the average-to-average method and the weighted-average dumping margin calculated using the average-to-transaction method. Where there was a meaningful difference between the results of the average-to-average method and the average-to-transaction method, the average-to-transaction method was applied to all sales to determine the appropriate weighted-average margin of dumping for the respondent in question.¹¹

Differential Pricing Analysis

While the *Nails* test is a statutorily consistent and statistically sound methodology for identifying whether the average-to-transaction method might be appropriate, the Department has continued to seek to refine its approach with respect to the use of an alternative comparison method. Given the Department's experience over the last several years, and based on the Department's further research, analysis and consideration of the numerous comments and suggestions on what guidelines, thresholds, and tests should be used in determining whether to apply an alternative comparison method based on the average-to-transaction method, the Department is developing a new approach for determining whether application of such a

¹¹ See, e.g., *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010); *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 59217 (September 27, 2010); *Certain Stilbenic Optical Brightening Agents From Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027 (March 23, 2012).

comparison method is appropriate in a particular segment of a proceeding pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act. The new approach is referred to as the “differential pricing” analysis, as a more precise characterization of the purpose and application of section 777A(d)(1)(B) of the Act. After obtaining some experience with this new approach,¹² the Department is now seeking public comment on the possible further development of its approach for use of an alternative comparison method.

Normally, the Department makes these types of changes in the context of its proceedings, on a case-by-case basis.¹³ For these particular changes, however, the Department is seeking comments to further develop and/or refine its differential pricing analysis, even though the notice and comment requirements of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” such as these.¹⁴ As the Department gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the average-to-average comparison method, the Department expects to continue to develop its approach with respect to the use of an alternative comparison method. The Department is requesting comments on this analysis to facilitate that development as the Department expects to

¹² See, e.g., *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) and issues and decision memorandum cmt. 3; *Xanthan Gum From Austria: Final Determination of Sales at Less Than Fair Value*, 78 FR 33354 (June 4, 2013); *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 2011-2012*, 78 FR 65272 (October 31, 2013); *Final Determination of Sales at Less Than Fair Value: Silica Bricks and Shapes From the People's Republic of China*, 78 FR 70918 (November 27, 2013); *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 2011-2012*, 78 FR 79662 (December 31, 2013); *Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review, 2011-2012*, 78 FR 79665 (December 31, 2013).

¹³ In the context of its proceedings, Commerce is entitled to make changes and adopt a new approach provided it explains the basis for the change, and the change is a reasonable interpretation of the statute. *Saha Thai Steel Pipe Company v. United States*, 635 F.3d 1335, 1341 (2011).

¹⁴ See 5 U.S.C. 553(b)(3)(A).

take account of all comments received, as appropriate. Further, in the context of ongoing and future proceedings, parties to the particular proceeding will have an opportunity to provide comments that are relevant to the possible use of an alternative comparison method in that proceeding.

Unlike under the targeted dumping analysis, the differential pricing analysis does not require an allegation, but instead would be conducted in each segment of a proceeding. The recent investigations of *Xanthan Gum from China* and *Xanthan Gum from Austria*, in which the Department employed a differential pricing analysis, are instructive, and can help the public understand the analysis. There, the Department explained that the differential pricing analysis requires a finding of a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions, or time periods. If such a pattern is found, differential pricing analysis helps the Department evaluate whether such differences can be taken into account when using the average-to-average method to calculate the weighted-average dumping margin.

As explained in the *Xanthan Gum* investigations, this analysis evaluates all purchasers, regions, and time periods to determine whether there exists a pattern of prices that differ significantly. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. Purchasers are based on the consolidated customer codes (or, if unavailable, the customer code) reported by the respondent. Regions are defined using the reported destination code (*e.g.*, zip code) and are grouped into regions based upon standard definitions provided by the U.S. Census Bureau. Time periods are defined by the quarter within the period of investigation or administrative review based upon the reported date of sale. Comparable merchandise is defined as the product control number and any characteristics of the

sales, other than purchaser, region and time period, that the Department uses in making comparisons between export price (or constructed export price) and normal value for the individual dumping margins. During the course of an investigation or administrative review, as in the investigation in *Xanthan Gum*, interested parties would be given the opportunity to present arguments and justifications for modifying these default group definitions.

The Department further explained in *Xanthan Gum* that in the first stage of the differential pricing analysis, the Department uses two tests – the “Cohen’s *d* test” and the “ratio test” – to determine whether there is a pattern of prices that differ significantly. The Cohen’s *d* test is a generally recognized statistical measure of the extent of the difference in the means between a test group and a comparison group. The Department calculates the Cohen’s *d* coefficient with respect to comparable merchandise if the test and comparison groups of data each have at least two observations, and if the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. The Cohen’s *d* coefficient is used to evaluate the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise. In a Cohen’s *d* test analysis, the extent of these differences can be quantified by one of three fixed thresholds: small, medium or large. Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. The Department finds that the difference is significant, and that the sales of the test group pass the Cohen’s *d* test, if the calculated Cohen’s *d* coefficient is equal to or exceeds the large threshold.

The Department next uses a “ratio test” to assess the extent of the significant price differences for all sales as measured by the Cohen’s *d* test. If the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test accounts for 66 percent or more of the value of total sales, then the identified pattern of export prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen’s *d* test as an alternative to the average-to-average method, and application of the average-to-average method to those sales identified as not passing the Cohen’s *d* test. If 33 percent or less of the value of total sales passes the Cohen’s *d* test, then the results of the Cohen’s *d* test do not support consideration of an alternative to the average-to-average method.

If both tests in the first stage (*i.e.*, the Cohen’s *d* test and the ratio test) demonstrate the existence of a pattern of prices that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, the Department examines whether using only the average-to-average method can appropriately account for such differences. In considering this question, the Department determines whether using an alternative comparison method yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the average-to-average method only. If the difference between the two weighted-average dumping margins is meaningful, then this demonstrates that the average-to-average method cannot account for the observed price differences, and, therefore, an alternative comparison method would be appropriate. In

determining whether a difference in the two weighted-average dumping margins is meaningful, the Department considers whether (1) the resulting weighted-average dumping margin moves across the *de minimis* threshold, or (2) there is a 25 percent or greater relative change in the weighted-average dumping margins between the average-to-average method and an appropriate alternative comparison method where both rates are not zero or *de minimis*.

The Department is interested in public comments on the differential pricing analysis described above for the purpose of determining whether to apply an alternative comparison method. To assist commenters, the Department has made available on its website, <http://www.trade.gov/enforcement/>, SAS programs which the Department currently use to conduct its differential pricing analysis. Also available on the website is the definition of the regions from the U.S. Census Bureau.

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Moustapha Sylla, Enforcement and Compliance Webmaster at (202) 482-0866, e-mail address: webmaster-support@ita.doc.gov.

Dated: April 28, 2014.

Paul Piquado,
Assistant Secretary,
for Enforcement and Compliance.